87-1719

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, and its LOCAL 1865,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Armco Inc. acquired a coke facility and integrated that facility into the production process of Armco's steel works. Armco treated the newly integrated coke department as an accretion to the steel works bargaining unit represented by the United Steelworkers of America. However, the National Labor Relations Board held that the coke department constituted an appropriate separate bargaining unit, and that Armco and the Steelworkers had violated the National Labor Relations Act in treating the coke department as an accretion to the Steelworkers unit. The Court of Appeals enforced the Board's order in pertinent part. The questions presented are:

1. Whether the National Labor Relations Board may properly carve out as a separate bargaining unit a department that comprises one stage of a functionally integrated production process, where to do so gives the employees in that unit unfair leverage over the entire production process and over the vast majority of the employees in the facility as a whole.

2. Whether a unit can be found to be appropriate for collective bargaining on the basis of a past bargaining history, where that history derives from the unit's previous status as an independent plant and the unit has subsequently been purchased by another employer and integrated into that employer's operations in a different industry.

PARTIES TO THE PROCEEDING

Petitioner United Steelworkers of America, AFL-CIO, along with its Local 1865, was a petitioner and cross-respondent in the Court of Appeals and a respondent before the National Labor Relations Board ("Board"). Armco Inc., petitioner in this Court in No. 87-1514, was also a petitioner and cross-respondent in the Court of Appeals and a respondent before the Board. In addition to the foregoing parties, the Oil, Chemical and Atomic Workers International Union was a charging party before the Board and an intervenor in the Court of Appeals, and the Board was a respondent and cross-petitioner in the Court of Appeals.

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UNITED STEELWORKERS OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

United Steelworkers of America, AFL-CIO, and its Local 1865 (hereinafter collectively "USWA") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 832 F.2d 857 and is reproduced in the Appendix at App. 1a-16a. The decision of the National Labor Relations Board (279 NLRB No. 143, May 30, 1986), including the decision of the administrative law judge, is not yet officially reported, and is reproduced in a supplemental appendix submitted jointly by Armco, Inc. in No. 87-1514 and by the Steelworkers in this case.

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1987. Timely petitions for rehearing were

denied on February 4, 1988. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent portions of sections 8(a)(1), (2), (3), and (5), 8(b)(1)(A) and (b)(2), and 9(a) and (b) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 158(a)(1), (2), (3), and (5), 158(b)(1)(A) and (b)(2), and 159(a) and (b), are set forth at App. 17a-18a.

STATEMENT OF THE CASE

USWA adopts the statement of the case of petitioner Armco Inc. in its petition for certiorari at No. 87-1514. We set forth the following brief summary to highlight the facts critical to the questions presented in this petition for certiorari.

More than 3,000 production and maintenance employees at Armco's Ashland Steel Works have for many years been represented by USWA. As is the case in the steel industry generally, those employees are all part of one facility-wide bargaining unit, reflecting the integrated nature of the continuous production process that characterizes a steel works. On December 31, 1981, Armco purchased from Allied Corporation for $100,000,000 Allied's nearby Ashland coke facility. That facility had theretofore been operating as an independent entity, selling coke on the open market, but the enterprise was failing economically. Allied, which was losing one and a half million dollars a month from its coke operation, had placed the facility on the market, but apart from Armco there were no interested potential buyers.

Upon acquiring the coke facility, Armco hired its approximately 130 active employees (250 more were on layoff at the time). By its acquisition of the facility Armco obtained for the first time a dependable internal supply of coke which it could transport immediately, while still warm, to fuel its blast furnaces. For compelling reasons

of efficiency, Armco integrated the new coke department into its continuous process of steel manufacturing. Like the various segments of an assembly-line, the production of each department at the Ashland Works depends on that of the departments before it in the production sequence, and all now depend upon the continued production of the coke department, which is at the front end of this tightly integrated steel fabrication process.

To coordinate this production process, Armco also integrated the coke department into the management and labor relations structure of the Ashland Works; and in conjunction with the complete integration of the coke department into the Ashland Works, Armco and USWA agreed that USWA would represent the coke workers as part of the existing facility-wide USWA bargaining unit. In entering into that agreement, USWA and Armco believed that the new coke department represented an "accretion" to the USWA unit.

Months after Armco's acquisition and assimilation of the coke department, the Oil, Chemical and Atomic Workers International Union ("OCAW"), which had represented the coke workers when they were employed by Allied, filed unfair labor practice charges with the National Labor Relations Board ("Board") against Armco, and later against USWA. OCAW charged, *inter alia*, that Armco had violated the Act by recognizing USWA as the bargaining agent for the coke employees, and that USWA had violated the Act by accepting recognition. After an evidentiary hearing, the Administrative Law Judge ("ALJ") sustained the charges on the grounds that the coke department constituted a separate appropriate unit and was therefore not an accretion to the USWA unit.[1] The Board adopted the ALJ's decision, with certain exceptions not relevant here.

[1] The ALJ also found that Armco and USWA had unlawfully required coke plant employees to execute USWA dues checkoff and authorization cards as a condition of employment. That finding,

The Court of Appeals for the Sixth Circuit enforced the Board's order in pertinent part.[2] The court relied heavily upon the bargaining relationship between OCAW and Allied that had existed when the coke facility was an independent operation, holding that "[t]his fact alone suggests the appropriateness of a separate bargaining unit." App. at 11a. While "recogniz[ing] that the relatively small size of the coke workers bargaining unit creates a possibility of unfair leverage," App. at 15a, the Court of Appeals nonetheless upheld the Board's decision.

REASONS FOR GRANTING THE WRIT

Summary

The decision below flies in the face of precedent and economic reality by failing to recognize that the continuous, integrated nature of the manufacturing process at Armco, and the critical role of the coke department at the front end of that continuous process, create an indivisible community of interest between the coke department and the rest of the steel works which mandates a facility-wide bargaining unit. The failure of the Board and the Court of Appeals to comprehend that reality, and their resulting approval of an unprecedented separate bargaining unit within a continuous-process manufacturing facility, conflicts with decisions of the Fourth and Seventh Circuits, *NLRB v. Harry T. Campbell Sons' Corp.*, 407 F.2d 969 (4th Cir. 1969); *Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087 (7th Cir. 1984), and saddles the Ashland Works with an economically unworkable dual-unit structure that does not exist in any other steel works in the country.

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affirmed by the Board and the Court of Appeals, is not at issue in this petition.

[2] The Court declined to enforce one aspect of the Board's remedial order—the backpay order against Armco—and remanded that matter to the Board (App. 15a-16a).

The error of the Board and the Court of Appeals in minimizing the importance of the integrated manufacturing process is compounded by the exaggerated weight they accorded to other factors in making the unit determination, particularly the past bargaining history of the coke workers. Only by turning a blind eye to the fundamental economic characteristic of the *present* coke department—its critical role at the front end of a continuous steel manufacturing process—could the Board and the court grant decisive significance to the *past* history of the coke workers while employed by a different employer in a different industry. This reliance on a defunct bargaining history conflicts with the Seventh Circuit's decision in *NLRB v. Indianapolis Mack Sales & Service, Inc.*, 802 F.2d 280 (7th Cir. 1986).

Together these analytical flaws have resulted in the creation of an unprecedented separate bargaining unit within an integrated heavy manufacturing facility. The consequence is to place Armco's productive capacity, and the interests of the overwhelming majority of its workers, at the mercy of a small minority of employees in the coke department, and to negate the entire economic basis of Armco's acquisition of the coke facility. More importantly, the analysis of the Board and the Sixth Circuit, if adhered to by the Board or followed by other circuits, would confound the process of unit determination in every case involving the acquisition and integration of production facilities by employers in the heavy manufacturing sector. The practical significance of the decision here, as well as its departure from established, well-grounded precedent, renders the case worthy of this Court's review.

I. THE DECISION BELOW, BY FAILING TO ACCORD PIVOTAL SIGNIFICANCE TO THE FACT THAT THE OPERATIONS IN QUESTION ARE PART OF A CONTINUOUS MANUFACTURING PROCESS, IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS, AND IGNORES ECONOMIC REALITY.

1. Under settled precedent, the existence of a continuous manufacturing process, such as an assembly line or analogous straight-line production process, has been of critical significance in bargaining unit determinations under the Act,[3] and efforts to carve out a separate bargaining unit composed of one segment of a continuous production process have uniformly been rejected in heavy manufacturing industries.[4] The reasons that underlie this line of decisions were well explained by the Court of Appeals for the Fourth Circuit in rejecting a separate unit for a group of calcite workers in an integrated stone quarry:

> Because of the integrated and interdependent nature of the Texas operations a labor dispute at calcite

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[3] *See, e.g., E.I. DuPont Co.*, 205 NLRB 552, 554 (1971) ("high degree of functional integration between the sulphuric acid department and the operations of the entire plant"); *U.S. Plywood-Champion Papers*, 174 NLRB 292, 295 (1969) ("the integrated nature of the operations"); *Radio Corp. of America*, 173 NLRB 440, 445 (1968) ("employees in the units sought . . . are highly integrated into the production functions of the Company . . . [and] essential to the production output of the [entire] plant . . . ."); *Mobil Oil Corp.*, 169 NLRB 261 (1968) ("high degree of integration . . . between the powerhouse functions and the storage and distribution operations . . . .").

[4] *See, e.g., Noranda Aluminum*, 186 NLRB 217, 218 (1970); *National Tube Co.*, 76 NLRB 1199 (1948) (overruled in part by *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966)); *Geneva Steel Co.*, 57 NLRB 50, 55-56 (1944); *Sheffield Steel Corp.*, 43 NLRB 956, 959 (1942); *Tennessee Coal, Iron & R.R. Co.*, 39 NLRB 617 (1942); *Inland Steel Co.*, 34 NLRB 1294, 1299 (1941); *National Tube Co.*, 33 NLRB 1248, 1252 (1941); *Wheeling Steel Corp.*, 8 NLRB 102, 108 (1938). *See also* cases cited in n.3 *supra* and n.5 *infra*.

> would undoubtedly severely disrupt the operations of the remaining facilities, causing economic hardship to employees not involved in the dispute but dependent upon the uninterrupted functioning of the quarry operation. This is neither the encouragement of stable collective bargaining nor is it collective freedom of choice as contemplated by the Act.

NLRB v. Harry T. Campbell Sons' Corp., 407 F.2d 969, 979 (4th Cir. 1969). Similarly, the Court of Appeals for the Seventh Circuit refused to permit the creation of a separate bargaining unit for workers at one "stage[] in a single lithographic production process":

> Like Continental Web we find it difficult to understand why there should be separate units for pressmen and preparatory employees. . . . It is as if the Board had said that the workers at the beginning of an assembly line belong in a different bargaining unit from the ones at the end; for preparation and printing are successive stages in a single lithographic production process.

Continental Web Press, Inc. v. NLRB, 742 F.2d 1087, 1091 (7th Cir. 1984).

In these precedents, the crucial fact was the ability of a separate bargaining unit within the integrated facility to shut down or disrupt operations in the facility as a whole, to the detriment of the employer and the other employees.[5] The Sixth Circuit recognized that this case presents that very "possibility of unfair leverage" by the coke workers against Armco and the large majority of its employees. App. at 15a. But the court failed to recognize that this fact goes to the very heart of the

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[5] As the Board has put it in prior cases, a separate unit is highly disfavored where "any work stoppage [in the proposed separate unit is] likely to have an immediate and adverse impact on the Employer's production operations." *Motor Wheel Corp.*, 234 NLRB 358, 361 (1978); *Noranda Aluminum, supra*; *Sheffield Steel Corp., supra*, 43 NLRB at 959. *See also* cases cited in nn. 3 and 4, *supra*.

bargaining unit determination, and mandates a facility-wide unit. The court's failure in this regard places it in conflict with the decisions of the Fourth and Seventh Circuits cited above.

The unprecedented nature of the decision in this case, and its untenable economic ramifications, are highlighted by the fact that in no other steel works in the country is the coke department treated as a separate bargaining unit. Under the Sixth Circuit's decision, the Ashland Works and its employees will become the only mill in the steel industry—and virtually the only mill in heavy manufacturing industries generally—that must deal with a separate bargaining unit at the front end of its integrated production process.

Certiorari should be granted to eliminate the inconsistency between the approach to this issue adopted by the Board and the Sixth Circuit in this case, and the approach that has heretofore been applied in unit determination in industries involving functionally integrated production processes.

II. IN ACCORDING CRITICAL SIGNIFICANCE TO THE PAST BARGAINING HISTORY OF THE COKE WORKERS UNDER A DIFFERENT EMPLOYER IN A DIFFERENT INDUSTRY, THE ANALYSIS OF THE DECISION BELOW IS IN CONFLICT WITH THAT OF THE SEVENTH CIRCUIT.

It is clear why the factor of functional integration has been and should be given decisive importance in unit determinations under the Act: it is a matter that goes to the heart of the economic enterprise, and hence to the community of interests among the employees of the facility.[6] The Board and the Court of Appeals, however,

[6] From its early days the Board has recognized that "the chief object [in a unit determination] . . . is to join in a single unit only employees, and all such employees, as have a mutual interest in the

subordinated that factor in this case to such immaterial considerations as the fact that "the coke plant continues to maintain its own telephone exchange, credit union, and time clock," App. at 11a, and the fact that there is not a great deal of employee interchange between the coke department and other departments. *Id.*[7] This exaltation of the irrelevant reached its zenith in the Court of Appeals' reliance on the fact that "[f]ormerly, the coke workers unit was an independent, separate plant with a long bargaining history and a long union relationship," *id.*—a fact which, in the Sixth Circuit's view, "alone suggests the appropriateness of a separate bargaining unit." *Id.*

The Court of Appeals' reliance on the coke workers' *past* as an independent bargaining unit "begs the question," *NLRB v. Indianapolis Mack Sales & Service, Inc.*, *supra*, 802 F.2d at 285, and reflects once again the

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objects of collective bargaining." 3 N.L.R.B. Ann. Rep. 174 (1938). *See also Continental Web Press, Inc. v. NLRB*, *supra*, 742 F.2d at 1089-1090 (Posner, J.) (observing that although the governing standard is "community of interest," the Board has neither "tried to give [the term] a precise meaning" nor "explained the purpose behind the formula").

[7] The uncontroverted record evidence shows—and the Board and the Court of Appeals did not dispute—that a similar level of employee interchange exists as between *any* two departments of a steel works; and the same holds true with respect to the Court's observation that coke department jobs and jobs in other departments involve "dissimilar skills, duties, and working conditions." App. at 10a. In prior cases, the Board has recognized that it is often "not contemplated that there will be much interchange" of employees from one department to another in an integrated manufacturing facility, and that this fact is simply less "compelling," for purposes of unit determination, than the fact of functional integration. *Noranda Aluminum*, *supra*, 186 NLRB at 218. *See also McGraw Edison Co.*, 182 NLRB 852, 853 (1970) ("absence of such interchange, because of special and different skills, may mean only allocation of different duties as in different departments under a single roof," and does not warrant splintering the bargaining unit).

court's refusal to consider the economic realities involved in Armco's acquisition and integration of the coke facility. Quite simply, the coke workers' previous employment in a failing independent plant in the *coke* industry is of no relevance in determining an appropriate bargaining unit now that the coke facility has been absorbed into a manufacturing complex in the *steel* industry. The purchase and integration of the coke facility into the Ashland Steel Works brought with it a fundamental change in the coke workers' circumstance: they are now an integral part of a major facility in the basic steel industry, and their interests are inextricably bound up with those of the other employees in that facility. And, equally to the point, the coke workers' new employer, as part of the basic steel industry, must cope with an entirely different constellation of concerns than were presented to Allied in its relationship with OCAW, not the least of which is the vulnerability entailed by the separate representation of one department at the front end of Armco's continuous manufacturing process. *See supra* pp. 6-8.

The reliance of the Board and the Court of Appeals on the defunct bargaining relationship between Allied and OCAW conflicts, once again, with the cogent reasoning of the Seventh Circuit, which recently chastized the Board in a similar context for focusing too narrowly upon the bargaining history of a group of employees with their former employer. *NLRB v. Indianapolis Mack Sales & Service, Inc., supra*, 802 F.2d 280. As that court recognized:

> A bargaining unit may have been in existence for some time before the change in ownership. However, the issue here is one of successorship, so that the Board must determine whether the unit was appropriate and remains so in the alleged successor. *It begs the question to rely on the bargaining history of the predecessor alone . . . .*

Id. at 285 (emphasis added). The Sixth Circuit made precisely that error here.

III. THE DECISION BELOW HAS IMPORTANT PRACTICAL IMPLICATIONS AND MERITS REVIEW BY THIS COURT.

As we have shown, the decision below marks a sharp break from precedent in failing to accord decisive weight to the fact that the separate bargaining unit approved by the Board and the court constitutes one stage of a functionally integrated production process (*supra*, pp. 6-8), and in according significant weight to a past bargaining history in a different industry, which is now defunct and immaterial (*supra*, pp. 8-10). In this case, the result of the faulty analysis adopted by the Board and the court is an unworkable dual bargaining unit which is unprecedented in the basic steel industry, and in heavy manufacturing industries generally. For future cases, the implications if this decision is not reversed are extremely unfortunate.

The entire point of Armco's acquisition of the coke facility was that that facility, which could not survive economically as an independent plant, *could* survive if it were absorbed into the steel works and operated as an integral component of the steel works' production process. Thus, Armco's decision to integrate the coke facility into the overall operations of the steel works was the very essence of the company's decision to purchase the facility.[8] By disregarding this fact and requiring Armco to treat the coke department as a separate bargaining unit, the decision below nullifies the entire economic basis

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[8] Armco's Corporate Director of Industrial Relations explained that Armco had determined as a matter of "fundamental economics" that it would make sense to purchase the coke facility if, but only if, the facility could be operated as an integral department of the steel works, and as part of the overall steel works bargaining unit, rather than as a separate facility (Tr. 291-292).

of Armco's acquisition of the facility.[9] And, as discussed, the effect of this decision is to place all the operations of the steel works, and the interests of the thousands of employees who work there, at the mercy of the relatively small number of coke workers, who now have the power to shut down or disrupt the operations of the entire works.

If such an approach is followed in future cases, equally untenable results can be expected. Put simply, in this era of industrial change and realignment, an approach to unit determination which accords greater weight to the location of time clocks and credit unions than to the economic structure of the employing enterprise provides an unacceptable basis for determining sound unit structures. Because of these practical implications, as well as the conflict with prior decisions discussed above, this case merits the Court's review.

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[9] As Armco explains in its Petition for Certiorari in No. 87-1514 at pp. 16-17, the splintering of the bargaining unit will require the company to revert to its pre-acquisition practice of coke stockpiling, in order to attempt to mitigate the "possibility of unfair leverage" now enjoyed by the coke unit by ensuring that a work stoppage will not leave the steel works without a supply of coke when it is needed. Thus, if the decision below is allowed to stand, the $100,000,000 Armco paid for a failing coke plant will not have produced a dependable supply of coke for the Ashland Works.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Nos. 86-5616/5707/5825/5826

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARMCO, INC. (86-5616/86-5825),

UNITED STEELWORKERS OF AMERICA, LOCAL 1865
(86-5707/86-5826),

Petitioners
Cross-Respondents,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent
Cross-Petitioner.

On Petition for Review and Cross-Application for
Enforcement of an Order of the
National Labor Relations Board

Decided and Filed November 3, 1987

Before: MERRITT and MARTIN, Circuit Judges; and BROWN, Senior Circuit Judge.

BOYCE F. MARTIN, JR., Circuit Judge. Armco, Inc., and the United Steelworkers of America seek review of an order of the National Labor Relations Board finding them guilty of an overly-aggressive organizational effort in violation of the National Labor Relations Act.

This case arises from Armco's acquisition of an Allied Chemical coke plant in Ashland, Kentucky on December 31, 1981. Armco owned and operated a steel production plant only a few miles from the coke plant, and it paid $100 million to Allied with the idea of obtaining a constant and high-quality supply of coke for its Ashland blast furnaces.

The controversy arose from Armco's unilateral decision to accrete the coke plant workers to the Steelworkers' bargaining unit at the steel plant, and from its failure to recognize or bargain with the Oil, Chemical and Atomic Workers (OCAW) which had always represented the workers at the coke plant. This decision resulted in a meeting at which the coke workers were required to sign Steelworkers' dues checkoff cards if they wished to work for Armco. The National Labor Relations Board found that the coke workers represented a separate and appropriate bargaining unit and that Armco's actions constituted unfair labor practices in violation of sections 8(a)(1), (2), (3), and (5), and 8(d) of the National Labor Relations Act, 29 U.S.C.A. §§ 158(a)(1), (2), (3), and (5), and § 158(d). The Board also found that, by its actions, the Steelworkers had violated sections 8(b)(1)(A) and (b)(2) of the Act, 29 U.S.C. §§ 158(b)(1)(A) and (b)(2). This decision appears at 279 N.L.R.B. 143 (May 30, 1986), and it affirms the lengthy rulings of the administrative law judge.

For the reasons that follow, we affirm, and we order that the decision of the Board be enforced.

I. *FACTS*

For approximately 35 years, Allied Chemical Corporation was engaged in the production of coke and its by-products at the Ashland plant. Since 1952, that plant's employees were represented by the OCAW International Union, its Local 3-523, and OCAW's predecessor. The

most recent collective bargaining agreement between Allied and OCAW was effective from August 5, 1979 through May 14, 1982. During 1981, the coke plant produced 500 tons per day, nearly all of which was sold to Armco. But, because the plant's production capacity was 2800 tons per day, nearly two-thirds of the employees had been laid off.

The employees of Armco's Ashland Works had been represented by the Steelworkers since 1942, and their most recent contract was effective from March 1, 1983 through July 31, 1986. During 1981, Armco needed about 2800 tons of coke per day to operate its Ashland Works. The coke Armco did not buy from Allied was purchased on the open market.

In 1979, Allied decided to withdraw from the coke-producing business, and it began selling its facilities. In 1981, Armco began looking toward the purchase of the Ashland coke plant. Armco apparently considered a number of alternative methods of operating the plant, and it decided that the most efficient way would be to integrate the facility into its Ashland Works. There were two other alternatives: operating it as a self-standing unit, which Armco alleges would have caused redundancy in maintenance personnel and would have continued the need to stockpile coke as a hedge against production interruption; and purchasing assets only, allowing the company to hire new labor. The latter option was apparently rejected as incompatible with the strong union ethic predominant in Ashland. In addition, it would have been a great burden for Armco to train all new personnel.

In November 1981, Allied and Armco signed a letter of intent concerning the purchase. On November 25, two Allied representatives informed OCAW President Robert Goss of the purchase plan, telling him that Armco would not recognize the OCAW contract. Armco's Corporate Director, James Wallace, informed the Steelworkers District Director Edgar Ball that Armco wished to bring

the coke plant workers in under the Steelworkers contract and that the company would not recognize the OCAW. On November 30, Ball called Goss and related this development. Goss responded that, if satisfactory arrangements could be made with respect to job security, seniority, and pensions, the OCAW would consider releasing the employees.

Numerous conversations between the various parties ensued. The Steelworkers union was concerned that the OCAW might file raiding charges with the AFL-CIO. The OCAW's International Representative, Kenneth McKeand, said he intended to do everything in his power to keep the coke workers OCAW. It soon became clear, however, that the OCAW had little leverage against Armco. An Allied representative stated that, if Armco did not buy the plant, it would be shut down. Thus, despite an overwhelming vote among the coke workers to maintain their OCAW status and avoid accretion into the Steelworkers, the OCAW had no viable alternative because Armco was represented as "the only show in town."

A memorandum of understanding was signed between the Steelworkers and Armco on December 15, 1981, detailing the arrangements governing the purchase of the plant and the hiring of the coke workers. As a result, Armco offered to hire all of the Allied employees, recalling laid-off workers as production increased, with no probationary period required. The Allied workers, though, would all be given a new seniority date of December 31, 1981, and they all would be required to sign Steelworkers dues checkoff and authorization cards as a condition of employment. Although both Goss and McKeand initially objected to this requirement, they eventually told the coke workers to sign the cards rather than risk losing their jobs. At no time, however, did OCAW unconditionally release the employees to the Steelworkers, and at no time did the workers vote to be represented by the Steelworkers.

The sale was final on December 31, 1981, and, as of January 2, 1982, Armco began applying the terms of its bargaining agreement with the Steelworkers to the coke plant employees. Armco had purchased all of Allied's equipment, material, and supplies, and it operated the plant with the same machinery, equipment, and production methods previously used by Allied.

What then followed were disagreements and struggles within the OCAW itself, apparently caused by dissatisfaction of the Local members. In March 1982, the officers of the Local OCAW sent a letter to the Steelworkers denying that the coke plant was an accretion to the existing Armco unit, and the letter stated that the OCAW had never been notified of negotiations between Armco and the Steelworkers involving the coke plant employees. These negotiations involved the coke workers' terms and conditions of employment and resulted in lost pensions, wages, seniority, vacations, and benefits. The Steelworkers did not respond to the letter.

In his letter of March 18, OCAW President Goss announced a meeting to be held March 28 to determine the position of the members on the issue of whether the OCAW should assert bargaining rights. The letter stated that the OCAW had not previously asserted those rights because its primary concern had been to ensure job opportunities and recall rights. Approximately 300 members attended the meeting, and they voted unanimously to assert the OCAW's bargaining rights at the coke plant.

On April 5, a committee of Local OCAW members sent Armco a letter demanding that it negotiate with the OCAW. The union denied that the coke plant was properly accreted to Armco's Steelworkers bargaining unit, and it asserted that Armco's interest in dealing with a single union was outweighed by the rights of the employees to choose their own bargaining representative. Armco responded by letter on April 12. The company

refused to bargain with the OCAW committee on the ground that the coke workers were part of the Steelworkers bargaining unit.

Also on April 5, OCAW President Goss reported to the Local members that he was placing the Local union under the administratorship of an International representative. This change displeased Local members; through attorney Richard Bank, they filed an unfair labor practice charge against the OCAW International. The OCAW International then filed suit in federal court to enjoin the Local committee members from attempting to bargain on behalf of the OCAW. The district judge held a hearing on April 14 at which the various factions of the OCAW reached an agreement. The OCAW International agreed to file an unfair labor practice charge against Armco, and it agreed to attempt to regain bargaining rights. Bank agreed to withdraw the charges brought against the International. The court then entered an order denying the injunction against the Local, but the order did establish a limited administratorship for the purpose of holding an election of officers.

On April 15, the OCAW filed a charge against Armco, and the union made its first formal, authorized demand for recognition as the bargaining representative of the coke workers. The charge against the Steelworkers, which was consolidated with the charge against Armco, was filed by attorney Bank on June 14, 1982.

II. *PROCEEDINGS BELOW*

The administrative law judge upheld the OCAW's complaint against both the Steelworkers and Armco. He ordered that Armco cease granting recognition to the Steelworkers as the bargaining representative of the coke plant employees, cease giving effect to the collective-bargaining agreement between Armco and the Steelworkers for the coke workers, and cease giving effect to any dues checkoff authorizations in favor of the Steelworkers. He

also ordered that Armco and the Steelworkers jointly and severally reimburse the coke workers for dues unlawfully withheld since January 1, 1982, with interest. The administrative law judge then recommended that Armco reinstate the terms and conditions of employment for the coke workers that were in effect prior to Armco's unilateral changes. He also recommended that Armco reimburse the employees for any monetary loss suffered as a result. He specifically stated that Armco could not withdraw any benefits which had inured to the coke workers. He then ordered that Armco must bargain upon request with the OCAW as the exclusive representative of the workers in a bargaining unit defined as:

> All production and maintenance, all accounting clerical, office traffic clerical and stores clerical, plant chemist, research technicians, employees of the company at its Ashland, Kentucky [coke] plant, but excluding assistant plant controller, all employee relations department, plant buyer, storekeeper, draftsmen, and technicians of the plant engineering office, professional employees, guards and all supervisors as defined in the Labor-Management Relations Act, 1947.

As for the Steelworkers, the administrative law judge ordered that it cease giving effect to its collective bargaining agreement on behalf of the coke workers, cease accepting or deducting dues from the coke plant employees, and cease restraining or coercing the coke plant employees in the exercise of their rights guaranteed under Section 4 of the Act. He also held the Steelworkers liable for the reimbursement of the coke plant employees, with interest, for any dues deducted since January 1, 1982.

The recommendation and the remedial order were adopted by the National Labor Relations Board. (One of the three members of the panel dissented in part.)

III.

Both the Steelworkers and Armco argue on appeal that the Board abused its discretion in finding that the coke workers constituted a separate and appropriate bargaining unit and that, therefore, neither party violated the Act by its actions. The Steelworkers union also contends that the charge filed against it was untimely because it was filed beyond the six-month limitations period of section 10(b), 29 U.S.C. § 160(b). As mentioned above, we find that the OCAW's action was timely filed, and we hold that the Board did not abuse its discretion in finding the coke plant employees were a separate and appropriate unit.

A. *The Statute of Limitations*

The Steelworkers union attempts to rely on *United States Postal Service Marina Mail Processing Center*, 271 N.L.R.B. 397 (1984), to show that the OCAW had unequivocal notice of Armco's decision to recognize the Steelworkers as the coke workers' representative earlier than December 15, 1981, the date of the memorandum of understanding. We are not persuaded. While we agree with the Board's statement in that case, that the 10(b) period begins to run at the time an employee receives unequivocal notice of an adverse employment action rather than the time that action becomes effective, 271 N.L.R.B. at 400, we find that such an interpretation does not serve to bar the OCAW's action against the Steelworkers in this case.

Here, the Steelworkers union contends that the statutory period began to run on December 5, 1981, when Armco's manager informed OCAW representatives that Armco would treat the coke workers as an accretion to the Steelworkers unit and recognize the Steelworkers as their bargaining representative. As the Board points out in its brief, there is no evidence that the Steelworkers' representatives present at the December 5 meeting as-

sented to Armco's plan. At a meeting a few days earlier, the Steelworkers had expressed concern over being charged with violating the no-raiding provisions of the AFL-CIO constitution. The OCAW may reasonably have assumed that the Steelworkers would honor these provisions Thus, though the announcement at this meeting certainly provided the OCAW with notice of Armco's intent, we cannot construe it to have constituted unequivocal notice of what the Steelworkers planned to do. We find that such unequivocal notice only occurred on December 15, 1981, when the Steelworkers signed the memorandum of understanding with Armco. Thus, the June 14, 1982 charge against the Steelworkers was filed within the six-month time period of section 10(b).

B. *Accretion versus a separate and appropriate unit.*

Both the Steelworkers and Armco contend that the Board improperly determined that the coke plant employees constituted a separate and appropriate bargaining unit and that, therefore, the employees were properly represented by the Steelworkers. We disagree, and we hold that the Board's designation of the coke plant workers as an appropriate unit was correct.

To determine whether two groups of employees should be included in the same bargaining unit, the Board applies a "community of interest" test: the two groups must share a "community of interests sufficient to justify their mutual inclusion in a single bargaining unit." *Pacific Southwest Airlines v. NLRB*, 587 F.2d 1032, 1038 (9th Cir. 1978). This test consists of several factors: (1) similarity in skills, interests, duties, and working conditions; (2) functional integration of the plant, including interchange and contact among the employees; (3) the employer's organizational and supervisory structure; (4) the bargaining history; and, (5) the extent of union organization among the employees. *NLRB v. American Seaway Foods*, 702 F.2d 630, 633 (6th Cir. 1983). "Employee desires," an additional factor frequently included

in other circuits, is not a relevant factor in this circuit. *NLRB v. Pinkerton's, Inc.*, 428 F.2d 479, 484 (6th Cir. 1970).

Because of its wide experience, the Board should be given some deference in its selection of an appropriate bargaining unit through the application of the "community of interests" test. *South Prairie Construction Co. v. Local 627, Operating Engineers*, 425 U.S. 800 (1976). The Board's ultimate determination as to the appropriate unit must be upheld unless it is arbitrary, unreasonable, or an abuse of discretion. *NLRB v. American Seaway Foods, Inc.*, 702 F.2d at 632. But we review the Board's factual conclusions regarding the individual factors with less deference. The National Labor Relations Act provides the standard of review of such factual determinations: "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record as a whole shall be conclusive." 29 U.S.C. § 160(a).

We believe the Board's finding that the coke workers constituted a separate, appropriate bargaining unit was not arbitrary, not unreasonable, and not an abuse of its discretion. Further, we believe that the Board's intermediate, factual conclusions, which form the basis for its ultimate determination, are supported by substantial evidence.

The administrative law judge's conclusion that the two employee groups had dissimilar skills, duties, and working conditions is clearly supported by substantial evidence. All parties have acknowledged that the coke workers possess different skills, and that they work in a more hazardous environment than most steelworkers. Moreover, though the coke workers are not necessarily more skilled or better trained, their training is significantly different. This discrepancy surely was one of the reasons Armco chose to hire the Allied employees rather than an entirely new work force. In addition, the carcinogenic conditions existing in the coke plant are a constant haz-

ard to the coke workers, and, therefore, constitute a legitimate ground for separate bargaining.

Armco argues that the second factor, functional integration, was wrongly decided by the administrative law judge to militate against a finding of accretion. Armco emphasizes the continuous nature of the process for coke plant to finished product. We are not persuaded.

Formerly, the coke workers unit was an independent, separate plant with a long bargaining history and a long union relationship. This fact alone suggests the appropriateness of a separate bargaining unit. *Bay Medical Center, Inc. v. NLRB*, 588 F.2d 1174, 1177 (6th Cir. 1978) ("Courts have long recognized that the Board may take bargaining history into account when determining whether a proposed bargaining unit is appropriate."). No machinery has been transferred between the plants, and the coke plant continues to maintain its own telephone exchange, credit union, and time clock. Moreover, the coke workers continue to perform the same work, by the same methods, and using the same machinery as before Armco's purchase. Most employees also have the same supervisors. The only real change has been an increase in production, a change which does not alter the nature of the employing industry.

In addition, the lack of employee interchange between plants militates against a finding of functionl integration. *NLRB v. American Seaway Foods, Inc.*, 702 F.2d at 635. Out of a workforce of 2700 steelworkers, only 24 maintenance employees have any contact with the coke workers. Such a small, one-way exchange fails to undermine the appropriateness of the coke plant as a separate bargaining unit. *See Victoria Station, Inc. v. NLRB*, 586 F.2d 672, 675 (9th Cir. 1978). Furthermore, the hazardous conditions in the coke plant substantially decrease the possibility that steel plant employees would seek to transfer to coke plant jobs.

This fundamental problem, a lack of employee interchange, is exacerbated by the fact that all of the coke workers have a seniority date of December 31, 1981. In relation to the majority of the steelworkers, the coke workers have no seniority. Therefore, it is unlikely that any of the coke workers will be able to transfer in the near future. Thus, Armco's claim that it has done the coke workers a great favor by giving them the possibility of transferring to a more desirable division is not borne out in reality.

The company also argues that the administrative law judge incorrectly assessed the two union's bargaining histories. Although both the steel and coke industries have a history of independent union organization, Armco emphasizes that, in the steel industry, there are no steel plants in which the coke plant workers are represented by a separate union.

This argument is unavailing. Armco has failed to cite any case in which a previously-independent coke plant has been acquired and the employees accreted to a preexisting steelworkers bargaining unit. Furthermore, the case upon which it primarily relied, *Granite City Steel Co.*, 137 N.L.R.B. 209 (1962), can be readily distinguished. First, *Granite City* involved only 16 original powerhouse employees in contrast to the 400 employees in this case. Second, the wind and steam produced by the powerhouse workers are not commodities, like coke, which can be purchased in the open market. Moreover, these elements, which are used to operate blast furnaces, are arguably more integral to the steelmaking process. Finally, the powerhouse employees in *Granite City* had previously belonged to a bargaining unit which represented all of the powerhouse employees of the Union Electric Company; they had no history as a separate bargaining unit. These factors made a single bargaining unit appropriate in *Granite City*. Here, however, including the coke workers and the steelworkers in the same

bargaining unit would compromise the coke workers' section 7 rights "to self organization . . . [and] to bargain collectively through representatives of their own choosing. . . ." 29 U.S.C. § 157.

Admittedly, the third factor, the employer's organizational structure, may militate in favor of accretion. We concede that Armco exhibited centralized hiring procedures, and it demonstrated that wages, hours, and terms of employment were generally uniform.

But such proof does not undermine the reasonableness of the Board's determinations. As of the date of the hearing, no new employees had been hired. More importantly, the uniformity in wages, hours, and terms of employment is the result of the disputed conduct: the application of the Steelworkers' contract to the coke plant employees.

In sum, we hold that the Board's finding that the coke workers constituted a separate and appropriate bargaining unit was not arbitrary, not unreasonable, and not an abuse of its discretion. Furthermore, we hold that the factual conclusions which formed the basis of this determination are supported by substantial evidence. Therefore, by treating the employees at the coke plant as an accretion to the steel plant unit, Armco and the Steelworkers violated the Act.

C. *Requiring employees to execute Steelworkers dues checkoff and authorization cards as a condition of employment.*

It is well settled that the dues checkoff provisions are intended to be an area of voluntary choice for the employee. *NLRB v. Atlanta Printing Specialties*, 523 F.2d 783, 787 (5th Cir. 1975). Threats by either a union or an employer that employees will be discharged for failure to sign checkoff authorization cards violates the Act. *Metal Workers' Alliance, Inc.*, 172 N.L.R.B. 815, 817

(1968). Thus, as long as the Board's factual finding that Armco and the Steelworkers compelled the coke plant employees to sign the cards as a condition of employment is supported by substantial evidence on the record as a whole, we must affirm the Board's conclusion of violation. 29 U.S.C. § 160(a).

The evidence demonstrates that the Board's finding is supported by the record as a whole and is entitled to affirmance. Three former Allied employees testified on the record that, during a January 1982 orientation session, they were told that they had to sign checkoff and authorization cards if they wanted to work at Armco. A fourth coke plant employee, recalled from layoff in March 1982, testified that a similar statement was made in an orientation session following his recall. He specifically testified that he signed the checkoff authorization only because he believed he had to do so to get a job. Armco manager J. Edward Maddox admitted that he had taken the position that coke plant employees had to sign the card to work for Armco. The administrative law judge expressly discredited Armco supervisor Herb Salyer's testimony that he had not made statements which employees specifically remembered him making.

We believe that this testimony constitutes substantial evidence to support the Board's finding that Armco and the Steelworkers compelled the employees to sign the union's dues checkoff and authorization cards as a condition of employment. Thus, we affirm the Board's finding that Armco violated sections 8(a)(1), (2) and (3) of the Act and that the Steelworkers violated sections 8(b)(2) and (b)(1)(A).

D. *Armco's failure to recognize the OCAW*

As we have already stated, we believe the Board correctly concluded that Armco was a successor employer and that the coke plant remained an appropriate unit even after the Armco purchase. Under these circumstances,

we have no difficulty in finding that Armco violated sections 8(a)(5) and (1) of the Act by failing to recognize and bargain with the OCAW as the representative of the coke workers before making unilateral changes in their working conditions.

The facts fail to support Armco's contention that the OCAW waived its bargaining rights. In any case, such a waiver of a statutory right must be in "clear and unmistakable language." *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746, 751 (6th Cir 1963). An unambiguous waiver was not evident in this case.

Therefore, as was the case in *NLRB v. Burns Security Services*, 406 U.S. 272, 279-80 (1972), the bargaining unit remained unchanged, and Armco was not entitled to upset the union majority by recognizing another union.

We believe there was substantial evidence to support the Board's conclusion that Armco violated sections 8(a)(5) and (1).

IV. *Conclusion*

In essence, Armco and the Steelworkers have asked for leniency based on the current adverse economic climate of the steel industry. Their plea also emphasizes the charitable nature of Armco's act of buying a suffering plant and hiring its entire workforce. We have no doubt that Armco stepped in at a crucial moment in the lives of the coke workers and Allied, and we sympathize with the plight of those in the steel industry. We also recognize that the relatively small size of the coke workers bargaining unit creates a possibility of unfair leverage. None of these factors, however, justifies the flagrant refusal of Armco and the Steelworkers to recognize and bargain collectively with the OCAW.

It has come to our attention that the remedy ordered against Armco may be too harsh, for it would require the company to pay wages perhaps as much as three

dollars per hour more than the coke workers have been receiving since the time of the plant's purchase. In *Kallman v. NLRB*, 640 F.2d 1094 (9th Cir. 1981), the court set aside part of a similar remedial order and remanded the matter to the Board. The court there found that "[t]he function of the remedy . . . is to restore the situation, as nearly as possible, to that which would have occurred but for the violation." *Id.* at 1103, *citing Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). In *Kallman*, the facts indicated that the employer would not have agreed to union demands to pay the higher rate.

We believe that the same may be true in this case. Thus, we hold that the employer is responsible for the pay difference for the time which would have been required for bargaining. We will remand this matter to the National Labor Relations Board, however, for the factual determination required to decide the extent of backpay. As the court did in *Kallman*, we will leave it to the Board's discretion whether the resolution of these issues should be left to bargaining between the parties.

Therefore, with the exception of the backpay award, we affirm the findings of the National Labor Relations Board, and we grant enforcement of its order.

PERTINENT SECTIONS OF THE NATIONAL LABOR RELATIONS ACT

Sections 8 and 9 of the National Labor Relations Act, as amended, 29 U.S.C. § 158, 159, provide in pertinent part:

§ 158. Unfair labor practices

(a) Unfair Labor practices by employer

It shall be an unfair labor practice for an employer:

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . .;

(3) by discrimination in regard to hire, tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title;

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents:

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title . . . . ;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate

against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

* * * * *

§ 159. Representatives and elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

(b) Determination of bargaining unit by Board

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . .

(3) (2)

Nos. 87-1514 and 87-1719

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1987

ARMCO, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

UNITED STEELWORKERS OF AMERICA, AFL-CIO AND ITS LOCAL 1865, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board abused its discretion in finding that certain employees continued to comprise a separate appropriate bargaining unit and therefore could not properly be accreted into the steel works bargaining unit of the steel manufacturer that acquired the coke plant where they worked.

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OCTOBER TERM, 1987

No. 87-1514

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No. 87-1719

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NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a)[1] is reported at 832 F.2d 357. The decision and order of the National Labor Relations Board (Supp. App. 2-11), together with the findings and recommendations of the administrative law judge (Supp. App. 12-141), are reported at 279 N.L.R.B. No. 143.

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[1] "Pet. App." refers to the appendix to the petition in No. 87-1514.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1987. Timely petitions for rehearing and suggestions for rehearing en banc were denied on February 4, 1988. The petition for a writ of certiorari in No. 87-1514 was filed on March 12, 1988; the petition for a writ of certiorari in No. 87-1719 was filed on April 14, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. For approximately 35 years, Allied Chemical Corporation (Allied) produced coke in a plant in Ashland, Kentucky (Pet. App. 2a). The plant has a production capacity of approximately 2800 tons per day (*id.* at 3a). During 1981, however, it produced only about 500 tons per day and, as a consequence, nearly two thirds of its hourly employees, all of whom were represented by the Oil, Chemical, and Atomic Workers International Union, AFL-CIO (OCAW), were on layoff (*ibid.*). Almost all of the 500 tons of daily production was sold to petitioner Armco, Inc., which operated a nearby steel mill that used about 2800 tons of coke per day, the remainder of its coke needs being satisfied by other open market purchases (*id.* at 2a-3a). Armco's employees were represented by petitioners United Steelworkers of America, AFL-CIO, and its Local 1865 (Steelworkers) (*id.* at 3a).

In late 1981, Armco entered into negotiations with Allied to purchase the Ashland coke plant (Pet. App. 3a). After a tentative agreement was reached, Armco notified the Steelworkers and the OCAW that it intended to retain Allied's coke plant employees, to treat them as an accretion to the existing Steelworkers unit at the steel mill, and to apply the extant Steelworkers contract to them (*id.* at

3a-4a). Steelworkers, but not OCAW, ultimately agreed both to this arrangement and to have the seniority of Allied's employees run from the effective date of Armco's acquisition of the coke plant (*id.* at 4a-5a).

Armco then began conducting orientation meetings for Allied's employees, which local officers of Steelworkers attended (Pet. App. 4a; Supp. App. 72-73). At these meetings, Armco officials distributed Steelworkers' dues checkoff and authorization cards and, together with Steelworkers officials, told the employees that they risked discharge if they refused to sign the checkoff authorizations (Pet. App. 4a). The employees signed the checkoff authorizations, but objected to representation by Steelworkers (*ibid.*).

Armco's purchase of the coke plant became effective on December 31, 1981, and it commenced operations on January 2, 1982, using the same machinery, equipment, and production methods that Allied had previously used at the plant (Pet. App. 4a-5a). All of the hourly employees employed at the plant were former employees of Allied; and a substantial majority of the supervisors employed there were former Allied supervisors (Supp. App. 71). The superintendent of the plant had been its manager under Allied, and Armco assigned him responsibilities similar to those assigned to other Armco department heads (Supp. App. 91 & n.26). The employees performed essentially the same work for Armco as they had performed for Allied (Supp. App. 94); indeed, Armco decided to retain the existing work force at the coke plant precisely because its own employees were not trained to operate a coke oven (Supp. App. 53-54).

Armco treated the coke plant and the steel mill as distinct components of its steel manufacturing operations (Pet. App. 10a-11a). It used different job classifications at the two facilities (Supp. App. 93). It declined to transfer

employees between them (Supp. App. 91). Indeed, of the 2700 steel mill employees, 550 of whom were maintenance employees, only 24 employees—all maintenance employees—ever had any on-the-job contact with the coke plant's employees; and the same 24 employees were always assigned to perform the maintenance work at the coke plant in order to comply with OSHA regulations relating to carcinogenic conditions there (Supp. App. 93-94, 105-106, 117). Finally, Armco had the coke plant employees punch a separate time clock and use a separate telephone line and credit union; and the coke plant was approximately five miles fom the steel mill (Supp. App. 121, 122).

2. The coke plant employees remained unhappy with Armco's decision to apply the Steelworkers collective bargaining agreement to them (Pet. App. 5a). Accordingly, in April 1982, they urged OCAW to demand that Armco bargain with it as their representative (*ibid.*). When Armco refused to do so, OCAW filed unfair labor practices charges against Armco and Steelworkers with the National Labor Relations Board (*id.* at 6a).

After a hearing, an administrative law judge (ALJ) held that Armco had violated Section 8(a)(1), (2), and (3) of the National Labor Relations Act (NLRA or the Act) (29 U.S.C. 158(a)(1), (2), and (3)) by recognizing and entering into a contract with Steelworkers covering the coke plant employees, a majority of whom Steelworkers did not represent, and that Steelworkers had violated Section 8(b)(1)(A) and (2) of the Act (29 U.S.C. 158(b)(1)(A) and (2)) by accepting recognition and entering into a contract with Armco in these circumstances (Supp. App. 130-131). In addition, the ALJ held that Armco and Steelworkers had violated the above sections of the Act by requiring the coke plant employees, as a condition of their employment, to execute Steelworkers' dues checkoff and authorization

cards (Supp. App. 131). Finally, the ALJ held that Armco was a successor-employer with respect to the coke plant; that Armco was accordingly obligated to bargain with OCAW as the exclusive representative of the coke plant employees; and that Armco had violated Section 8(a)(1) and (5) of the Act (29 U.S.C. 158(a)(1) and (5)) by refusing to bargain with OCAW and by unilaterally changing the terms and conditions of employment of the coke plant employees (Supp. App. 131).

The ALJ rejected (Supp. App. 99-123) petitioners' contention that the coke plant employees were an accretion to the steel works unit and thus had not maintained their status as a separate appropriate bargaining unit. The ALJ noted that the accretion of employees into an existing bargaining unit is appropriate only " 'when such community of interest exists among the entire group that the additional employees have no separate unit identity' " (Supp. App. 103 (citation omitted)). The ALJ then found (Supp. App. 121-122) that the coke plant employees had in fact maintained a separate group identity after Armco took over the coke plant's operations, noting (*ibid.* (footnote omitted)) that

> [b]y virtue of their separate existence, separate location, and separate collective-bargaining history before the purchase, coke facility employees enjoyed a community of interest separate from the Works. In my opinion, in view of the functional distinctness, different skills and training, different work environment, geographical separation, general lack of personal contact with works employees, and partial autonomy, coke plant employees continue to have a community of interest separate from the Works employees. Their separate community of interest has not been submerged into any broader community of interest because there is no high degree of integration of the two * * *.

The ALJ also rejected Armco's contention that a separate unit was inappropriate here because "the coke facility has become an intimate part of Armco's continuous production of steel" (Supp. App. 119). He explained (Supp. App. 120-121 (footnotes omitted)) that:

> While * * * the coke moves directly from the coke facility to the blast furnace, the coke, like the iron ore and limestone, is nothing more than a material used in steelmaking. The continuous process does not begin at the coke facility but rather at the blast furnace. Consequently, while some coke facilities may historically have become part of integrated steel works, some exist, as Allied did, separate from the steel mill and they are in effect nothing more than suppliers of a material used in steelmaking. Coke may be an essential ingredient in steelmaking but the coke facility and its employees are not an essential part of the continuous production process. Admittedly Armco at Ashland has become dependent on a supply of coke from the facility but that dependence does not make the facility part of the continuous process. What it does do is allow Armco to avoid having to stock pile large amounts of coke and assures the quality of coke Armco[] uses. But this * * * does not preclude the employees in the coke facility from being a separate appropriate unit. *Mallinckrodt Chemical Works* [162 N.L.R.B. 387 (1966)]. What were separate units do not automatically merge where integration is lacking.

3. The Board, with Chairman Dotson dissenting in part, adopted the findings and recommendations of the ALJ and ordered Armco and Steelworkers (a) to cease and desist from applying the Steelworkers contract to the coke plant employees and (b) to reimburse the coke plant

employees for the dues that they were illegally required to pay to Steelworkers (Supp. App. 2-11). The Board further ordered Armco, upon request by OCAW, to bargain with it as the exclusive representative of the coke plant employees; to restore the terms and conditions of employment that existed prior to Armco's unilateral changes; and to reimburse the employees for any monetary losses suffered as a result of those unilateral changes (Supp. App. 131-133).

4. The court of appeals, with one exception not pertinent here,[2] affirmed the Board's decision and enforced its order (Pet. App. 1a-16a). It noted (*id.* at 9a (citation omitted)) that, "[t]o determine whether two groups of employees should be included in the same bargaining unit, the Board applies a 'community of interests' test: the two groups must share a 'community of interests sufficient to justify their mutual inclusion in a single bargaining unit.' " The court then noted (*ibid.*) that "[t]his test consists of several factors: (1) similarity in skills, interests, duties, and working conditions; (2) functional integration of the plant, including interchange and contact among the employees; (3) the employer's organizational and supervisory structure; (4) the bargaining history; and (5) the extent of union organization among the employees." And it added (*id.* at 9a-10a) that the Board's "ultimate determination as to the appropriate unit must be upheld unless it is arbitrary, unreasonable, or an abuse of discretion." The court concluded (*id.* at 10a) that "the Board's finding that the coke workers constituted a separate, appropriate

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[2] The court refused to require Armco to make the coke plant employees whole for the earnings that they lost due to Armco's unlawful conduct; rather, it remanded this aspect of the case to the Board for further proceedings (Pet. App. 15a-16a). No issue concerning this aspect of the court's judgment is raised here.

bargaining unit was not arbitrary, not unreasonable, and not an abuse of its discretion."

In reaching this conclusion, the court placed special emphasis on "[t]he administrative law judge's conclusion that the two employee groups had dissimilar skills, duties, and working conditions" (Pet. App. 10a). The court found that this conclusion was "clearly supported by substantial evidence" (*ibid.*), stressing that "[a]ll parties have acknowledged that the coke workers possess different skills, and that they work in a more hazardous environment than most steelworkers" (*ibid.*). The court was not "persuaded" by petitioners' contention that the two bargaining units were "functional[ly] integrat[ed]" (*ibid.*), noting (*id.* at 11a) that "the coke workers unit was an independent, separate plant with a long bargaining history and a long union relationship," that the acquisition of the coke plant by Armco had changed nothing about the plant's operations or the composition and tasks of the workforce, and that there was no employee interchange between the plants. The court similarly rejected (*id.* at 12a) petitioners' contention that the pattern of bargaining in the steel industry precluded a finding that separate bargaining units were appropriate, stating that there is no case "in which a previously-independent coke plant has been acquired and the employees accreted to a pre-existing steelworkers bargaining unit." Finally, it discounted the fact that Armco had demonstrated uniformity in wages, hours, and terms of employment between the coke workers and the other Armco employees (*ibid.*), reasoning that "the uniformity * * * is the result of the disputed conduct: the application of the Steelworkers' contract to the coke plant employees" (*id.* at 13a).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is unwarranted.

1. Section 9(b) of the Act (29 U.S.C. 159(b)) empowers the Board to decide "in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *." In this case, the Board found, as a factual matter, that the same employees continued to perform the same work at the coke plant; that the coke plant employees used the same machinery and production methods and worked under the same supervisors; that employee interchange between the coke plant and the steel mill was practically nonexistent; that there was virtually no on-the-job contact between coke plant employees and other Armco employees; and that the skills, training, and job classifications of the coke plant employees were significantly different from those of the steel mill employees. In view of the "functional distinctness, different skills and training, different work environment, geographic separation, general lack of personal contact with works employees, and partial autonomy" of the coke plant employees (Supp. App. 121-122 (footnote omitted)), it was entirely reasonable for the Board to conclude that the coke plant employees continue to have a separate group identity and that they could not be accreted into the steel works unit.[3]

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[3] Petitioners do not dispute that, if the coke plant employees remained a separate appropriate unit, the Board would be justified in treating Armco as a successor to Allied's bargaining obligation. See *Fall River Dyeing & Finishing Corp.* v. *NLRB*, No. 85-1208 (June 1, 1987), slip op. 15-16; *NLRB* v. *Burns Int'l Security Services, Inc.*,

The court below accordingly had no choice but to affirm the Board's decison. See *South Prairie Constr. Co.* v. *Local 627, Int'l Union of Operating Engineers,* 425 U.S. 800, 805 (1976); *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947).

2. Petitioners nevertheless contend (Armco Pet. 7-13; Steelworkers Pet. 6-8) that the court below erred in approving the Board's refusal to treat the coke plant operations as part of a continuous manufacturing process and that the decision below thus conflicts with decisions of the Fourth and Seventh Circuits. This contention raises a fact-bound issue that does not warrant review by this Court and, in any event, is meritless.

The court below was plainly justified in upholding the Board's finding that the coke plant was not part of a continuous process of producing steel. As the ALJ stated (Supp. App. 120-121 (footnote omitted)), in this steel manufacturing system, "[t]he continuous process does not begin at the coke facility but rather at the blast furnace." Thus, as the ALJ further noted (*ibid.*), "while some coke facilities may historically have become part of integrated steel works, some exist, as Allied did, separate from the steel mill and they are in effect nothing more than suppliers of a material used in steelmaking." And, finally, as the ALJ also noted (*ibid.* (footnote omitted)), while Armco's acquisition of the coke plant may have increased its dependence on a supply of coke from that facility, it did not make the coke facility and its employees "an essential part of the continuous production process" of steel—at least not to any greater extent than they were at

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406 U.S. 272, 280 n.4 (1972). Nor do petitioners dispute that employees who constitute a separate appropriate unit cannot be treated as an accretion to another unit and be forced to accept that unit's bargaining representative without a Board-supervised election. See *Melbet Jewelry Co.*, 180 N.L.R.B. 107, 110 (1969); accord *Meijer, Inc.* v. *NLRB*, 564 F.2d 737, 740, 742-743 (6th Cir. 1977); *Penn Traffic Co.* v. *NLRB*, 546 F.2d 677 (6th Cir. 1976).

the time Allied owned the plant. In short, the steel and coke production processes are not integrated, and separate bargaining units are appropriate. See *Mallinckrodt Chemical Works*, 162 N.L.R.B. 387 (1966).[4]

The decision of the Fourth Circuit in *NLRB* v. *Harry T. Campbell Sons' Corp.*, 407 F.2d 969 (1969), is not to the contrary. In that case, the Fourth Circuit held that a calcite operation was integrated with other operations of the employer and therefore that separate units were inappropriate. But the calcite operation at issue there was within 35 feet of the employer's other operations. Moreover, the calcite operation's employees and other employees regularly worked together; and job classifications were uniform throughout the facility. In short, there

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[4] Petitioners err in suggesting (Armco Pet. 9; Steelworkers Pet. 6) that the Board has a history of finding plant-wide units to be appropriate in steel and similar industries. To be sure, the Board at one time had a special rule for steel and three other industries, under which integration of operations and the bargaining pattern in the industries were deemed to compel the conclusion that only an overall bargaining unit was appropriate. See *In re National Tube Co.*, 76 N.L.R.B. 1199, 1207 (1948) (steel); *In re Permanente Metals Corp.*, 89 N.L.R.B. 804, 811 (1950) (aluminum industry); *In re Weyerhauser Timber Co.*, 87 N.L.R.B. 1076, 1082 (1949) (lumber industry); *In re Corn Products Refining Co.*, 80 N.L.R.B. 362, 364-365 (1948) (wet milling industry). In *Mallinckrodt Chemical Works*, 162 N.L.R.B. 387 (1966), however, the Board determined that the "distinctions between industries" in the existing case law was "arbitrary" (*id.* at 396), and that it "inten[ded] to free [itself] from the restrictive effect of rigid and inflexible rules in making [its] unit determinations" (*id.* at 398). The Board therefore announced that future unit determinations would be made "only after * * * weighing * * * all relevant factors on a case-by-case basis," and that it would "apply the same principles and standards to all industries" (*ibid.*); *National Tube* and its progeny were overruled to the extent that they established a per se rule that only overall units were appropriate in certain industries—including steel.

was "an extraordinary degree of integration and interdependence" (*id.* at 977-978). The opposite is true here.

Nor is the decision of the Seventh Circuit in *Continental Web Press, Inc.* v. *NLRB*, 742 F.2d 1087 (1984), inconsistent with the decision here. In *Continental Web Press*, the court found that "preparation and printing are successive stages in a single lithographic production process" (*id.* at 1091). The court based this finding on the fact that the two groups of employees were performing successive stages of a single operation, had similar skills, did similar work, received similar pay, and worked in adjacent areas of the same plant (*ibid.*). It thus remanded the case to the Board for further explanation of the decision to treat the pressmen and preparatory employees as comprising two identifiable groups (*id.* at 1092-1094). Here, on distinguishable facts, the Board has already provided such an explanation.

Petitioners suggest (Armco Pet. 10, 13; Steelworkers Pet. 7) that the decisions of the Fourth and Seventh Circuits turned on the ability of one group of striking employees to shut down an entire plant and that the same is true here. The decisions of those cases did not, however, turn on the fact to which petitioners point. The courts in those cases did note that one reason employees in an integrated production process are placed in a single bargaining unit is so that one group of employees in the operation cannot deprive the other employees of work by causing the operation to shut down. See *NLRB* v. *Harry T. Campbell Sons' Corp.*, 407 F.2d at 979; *Continental Web Press, Inc.* v. *NLRB*, 742 F.2d at 1090. But the courts did not suggest that employee groups must be combined wherever there is a danger that a strike by one group of employees could shut down an entire plant and thus deprive another group of employees of work, a possibility that exists whenever there is more than one unit established in an industrial

plant – whether its production processes are continuous or not. Rather, the courts in those cases relied on the traditional "community of interests" test in deciding that separate bargaining units were not appropriate. See *NLRB* v. *Harry T. Campbell Sons' Corp.*, 407 F.2d at 977-978; *Continental Web Press, Inc.* v. *NLRB*, 742 F.2d at 1091-1094. In any event, the record in this case does not support the suggestion that the coke plant employees could shut down Armco's steel mill operations. Prior to the purchase of the Ashland plant, Armco satisfied most of its coke needs through purchases on the open market. There is no reason to believe that it could not do so again.[5]

3. Petitioners next contend (Armco Pet. 12-13, 15-16; Steelworkers Pet. 8-11) that the court below erred in approving the Board's consideration of past bargaining history in its unit determination and that, as a consequence, its decision conflicts with the decision of the Seventh Circuit in *NLRB* v. *Indianapolis Mack Sales & Service, Inc.*, 802 F.2d 280 (1986). This contention is also without merit.

First of all, petitioner Steelworkers errs in suggesting (Pet. 8-11) that the Board and the court below subordinated the "community of interests" analysis to consideration of the past bargaining history of the coke workers. The Board merely considered whether the coke plant employees' previous status as a separate appropriate bargaining unit had been negated by their integration into the larger Armco workforce; it concluded, based on a

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[5] The cases that petitioners cite (Armco Pet. 13 n.10; Steelworkers Pet. 7 n.5) for the proposition that separate units are disfavored where a work stoppage is likely to have an immediate and adverse impact on production involve situations where the adverse impact flows from the integration of the operations, and not, as here, from the resulting reduced supply of a commodity used in the production process.

variety of factors, that Armco's purchase of the plant had not done so. See Supp. App. 99-123. The court below did the same. While it stated that the coke employees' "long bargaining history and * * * long union relationship [with OCAW] * * * alone suggests the appropriateness of a separate bargaining unit" (Pet. App. 11a), it did not in fact rely on that factor alone; rather, it looked to several factors—including the similarity of the employees' skills, interests, duties, and working conditions; the functional integration of the plants; and the employer's organizational and supervisory structure—and upheld the Board's multi-factored analysis. See *id.* at 9a-13a. The "community of interest" analysis plainly was not subordinated to past bargaining history.

Petitioners are similarly mistaken in suggesting (Armco Pet. 15-16; Steelworkers Pet. 9-10) that past bargaining history is irrelevant to the determination of a separate appropriate unit in a successorship situation. Athough *NLRB* v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272, 280 (1972), holds that a purchaser may make operational changes of such magnitude as to render a pre-existing unit inappropriate, the Court in that case also cited with approval (*id.* at 281) the Fifth Circuit's decision in *NLRB* v. *Zayre Corp.*, 424 F.2d 1159, 1165 (1970), which expressly held that bargaining history is a relevant factor for consideration in a successorship context and that the successor has the burden of demonstrating that its changes have destroyed the separate identity of the prior bargaining unit. Indeed, last Term, in *Fall River Dyeing & Finishing Corp.* v. *NLRB*, No. 85-1208 (June 1, 1987), slip op. 15, this Court made clear that, in a successorship situation, the continuing appropriateness of previous representation is to be assessed from "the employees' perspective" and must be "based upon the totality of the circumstances," which obviously includes past bargaining history.

The Seventh Circuit's decision in *NLRB* v. *Indianapolis Mack Sales & Service, Inc., supra*, does not suggest that past bargaining history cannot be considered in such situations. To be sure, the court there held that past bargaining history cannot be the sole basis upon which a separate unit determination rests. See 802 F.2d at 285-286. But the court also held that past bargaining history is a factor to be considered in determining whether a newly acquired unit remains appropriate. See *ibid.* That is precisely the approach that the Board and the court below took in this case.

4. Petitioner Armco also errs in asserting (Pet. 13-16) that "economic factors"—more particulaly, the employer's unified "economic mission" after acquisition—are central to the "community of interest" analysis. To give decisive weight to these factors would preclude less than plant-wide units from being found appropriate in any context, not just in the successorship situation. That result would conflict with Section 9(b) of the Act, which permits the Board to establish smaller than plant-wide units in order that employees will have the fullest freedom to select a representative of their choice.

5. Finally, petitioners cry "wolf" in suggesting (Armco Pet. 13-18; Steelworkers Pet. 11-12) that the decision below will unduly discourage acquisition of failing businesses and deter successor employers from retaining their predecessors' employees. Where it has a legitimate business reason,[6] a successor-employer may decide not to retain an existing workforce and, instead, to hire and train an entirely new one. But where it chooses to retain the pre-

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[6] Under the labor laws, a successor employer may not, of course, refuse to hire the predecessor's employees merely to avoid recognizing their bargaining representative. See *NLRB* v. *Burns Int'l Security Services, Inc.*, 406 U.S. at 279-280 & n.5; *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 262 n.8 (1974).

existing work force (and to avoid the expense associated with hiring and training a new one), the successor-employer is not free to "thwart[]" the employees' "legitimate expectations in continued representation by their union" merely because it fears that separate representation will give those employees undue economic leverage. See *Fall River Dyeing & Finishing Corp.* v. *NLRB*, slip op. 15. On the contrary, separate appropriate representation is a right granted those employees by the NLRA, and the employer must respect it; as this Court has said, industrial strife is more likely to result from frustration of the "legitimate expectations" of the employees in continued representation than from any leverage that may flow from recognizing their right to separate representation. See *ibid.*; accord *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 184 (1973).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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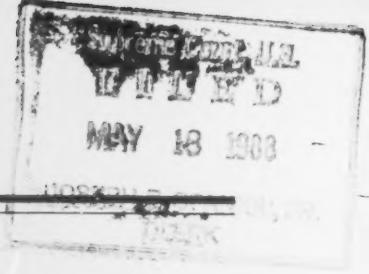

IN THE

Supreme Court of the United States

October Term, 1987

ARMCO, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD

UNITED STEELWORKERS OF AMERICA, AFL-CIO
AND ITS LOCAL 1865, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD

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QUESTIONS PRESENTED

1. Was the National Labor Relations Board ("N.L.R.B.", "Board") decision that the coke plant employees comprised a bargaining unit separate and distinct from the steel mill workers arbitrary and capricious?
2. Was the above-mentioned decision an abuse of discretion by the N.L.R.B.?

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ARMCO, INC., *Petitioner,*

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UNITED STEELWORKERS OF AMERICA, AFL-CIO AND ITS LOCAL 1865, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD

BRIEF OF THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 832 F.2d 357. Copies of the Opinion of the National Labor Relations Board (279 N.L.R.B. No. 143, May 30, 1986) and the Opinion of the Administrative Law Judge, have been lodged with the Clerk of this Court by way of a joint Supplemental Appendix filed by both Petitioners.

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1987. Petitions for Rehearing were denied on February 4, 1988. A Petition for Extension of Time to Respond

to the Petitions for Writ of Certiorari was filed both by the N.L.R.B. and the OCAW with this Court and an extension until May 19, 1988 was granted. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Allied Chemical Corporation was engaged in the production of coke and its by-products for 35 years in the Ashland, Kentucky area. From 1952 through 1981, its workers were represented by the Oil, Chemical and Atomic workers International Union, Local 3-523.[1]

Armco owns a steel mill in Ashland, Kentucky, and its 3700 workers are represented by the United Steelworkers of America ("USWA", "Steelworkers"). Although both facilities are located in Ashland, Kentucky, there is a distance of several miles between the two plants.

The two companies transacted business with each other, with Armco purchasing approximately 500 tons of coke per day from Allied, a total which represented almost all of Allied's daily production. Because the coke plant had a daily output capacity of 2800 tons, most of its approximately 400 workers were on layoff status during 1981. Allied desired to get out of the coke industry, therefore, it entered into negotiations with Armco for the sale for the Ashland coke facility. The sales was consummated on December 31, 1981, with Armco buying the coke plant for a price of $100,000,000.

In the steel industry, some, but certainly not all, manufacturers also own coke plants adjacent to or near their blast furnaces. The coke facility here is located several miles from the blast furnaces. Coke facilities require a work force that has specialized skills which are different from those possessed by

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[1] The Unions representation ended on 12/31/81 even though it had a collective bargaining agreement with Allied effective through May 14, 1982. The termination of this representation will be discussed below.

steel mill employees. So, although Armco had several hundred workers on layoff status at the steel mill, it wished to retain Allied's competent, stable, well-trained and highly skilled workforce because of the economic and practical benefits that such a move would bestow upon Armco's operations.

During negotiations, Armco told Allied that it would hire the entire workforce from the coke plant and would recall laid-off coke plant workers in accordance with their rights under the OCAW contract. Armco would refuse, however, to either recognize or negotiate with OCAW as bargaining agent for these workers, stating that it wished to bring the workers in under the Steelworkers' contract.

Talks were held between OCAW and USWA about this representational issue. Since both OCAW and USWA are members of the AFL-CIO, OCAW President Robert Goss sought a cooperative effort between the Unions to determine whether they could agree on a plan that would be in the coke plant workers best interest; a plan in which Armco would hire these workers with seniority, pensions, and other benefits intact. If this arrangement could be made and if OCAW Local 3-523's members agreed to USWA representation, Goss said he would consider releasing them subject to OCAW internal procedures for transferring jurisdiction to another international union. The statement by Goss that OCAW would consider releasing its members by no means meant that such release was either approved or imminent. None of the conditions mentioned by Goss was ever met.

Armco and USWA began to negotiate on December 2, 1981 on an agreement that would cover the coke plant employees. These negotiations produced an agreement which assigned the coke plant employees a seniority date of December 31, 1981 for purposes of plant-wide job rights.[2] The agreement effectively

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[2] The coke plant employees retained their Allied seniority for purposes of relative seniority within their own group, that is, for vacation and shift assignments. In that respect, nothing changed in their working conditions after the takeover.

prohibited any exchange of jobs between steel mill and coke plant employees. Thus, the coke plant employees became an entirely separate group not only because of a different community of interests but also because of a physical separation. No OCAW representative was invited to participate in the negotiations that led to the Armco-Steelworkers Agreement.

Because none of its objectives had been met in the Armco-Steelworkers Agreement, OCAW emphatically declined to sign the Memorandum of Understanding reached by Armco and the Steelworkers when the USWA presented it to OCAW. President Goss sought the assistance of the Steelworker's International President Lloyd McBride but when that assistance was not forthcoming, friendly communications between the two unions ended.

OCAW was advised by both Allied and Armco that it would be unwise to assert OCAW's bargaining rights, that Allied might shut the plant down instead of selling it to Armco and that the Armco-Steelworkers Agreement was "the only show in town" if the coke plant workers were to keep their jobs.

On December 19, Armco, Allied, and OCAW's local representatives met. Armco Official Ed Maddox explained terms of the transfer, which included a guarantee of jobs for the present workforce and eventual recall of laid-off workers. "That is," said Maddox, "unless someone gives us a reason not to." OCAW understood that the "reason not to" would be OCAW's insistence on continuing as the coke plant's bargaining representative. The ALJ, the Board, and the Sixth Circuit found that further OCAW demands would have been futile and the OCAW reasonably feared its members would have been futile and that OCAW reasonably feared its members would lose their jobs if the Union insisted on its legal prerogatives.

Armco took over the coke facility on December 31, 1981. At an indoctrination meeting for its employees on January 2, 1982, the coke plant employees were given membership applications and dues check-off authorization cards for the USWA

and were required to sign these as conditions of employment.[3] Although both President Goss and OCAW Local Representative Kenneth McKeand initially objected to this requirement, they eventually told the coke workers to sign the cards rather than risk losing their jobs. At no time, however, did OCAW unconditionally release the employees to the Steelworkers, and at no time did the workers vote to be represented by the Steelworkers.

The OCAW thereafter sought to maintain its jurisdiction over the coke plant workers. After consulting with its legal staff, the OCAW decided to pursue litigation instead of filing charges pursuant to Article XX of the AFL-CIO Constitution. This litigation has exhausted all administrative procedures at the N.L.R.B. and progressed to the U.S. Court of Appeals for the Sixth Circuit, where the Court upheld N.L.R.B. findings favorable to OCAW. The OCAW has pursued this course of action vigorously and at no time has the Union waived its right to act as bargaining agent for the coke plant employees.

REASONS TO DENY THE WRIT

I. THE DETERMINATION THAT MULTIPLE BARGAINING UNITS ARE NECESSARY FOR A SINGLE EMPLOYER DOES NOT CONFLICT WITH THE PRECEDENT ESTABLISHED BY THE N.L.R.B. THE BOARD HAS APPROVED SEPARATE BARGAINING UNITS

[3] Armco's Ed Maddox admitted that he had given an Affidavit to the National Labor Relations Board stating that signing the cards was required (Tr. 94). Several employees testified that questions were raised by the employees about the cards at several orientation meetings, and that the Company's uniform response was, "if you work for Armco, you have to sign the card." (Tr. 378; 131; 134; 377; 1033). Moreover, every employee did sign. (Tr. 94). As Darrell Clay testified, "I needed the job, and my understanding was that that was the only way that I could be hired - was to sign the card." (Tr. 165).

IN HIGHLY INTEGRATED INDUSTRIES IN THE PAST.

The Board has carved out separate bargaining units in highly integrated manufacturing processes in the past. This determination ws approved by the court of appeals in *N.L.R.B. v. Metal Container Corp.*, 660 F.2d 1309 (8th Cir. 1981). The court held that a separate bargaining unit for four electricians was appropriate despite the highly integrated nature of the Company's two-piece can manufacturing process. Although there were a total of 110 manufacturing employees in the plant, the court held that the four electricians had a community of interests that was separate and district from that of the other workers. Past industry practice was also found irrelevant in that determination. Seventy-one out of seventy-two plants that were previously organized in that industry had "wall-to-wall" bargaining units. Nevertheless, the Board and the court found that the controlling factor was whether or not the workers had a similar community of interest.

The Board also found that separate bargaining units were appropriate, a decision affirmed in *Hamilton Test Systems v. N.L.R.B.*, 743 F.2d 136 (2nd Cir. 1984), despite an outcry from the company that this would subject it to piecemeal unionization. Community of interests was once again the overriding factor in the Board's decision. In the present case, the Board found that the coke workers are involved in a different operation than the steel mill workers. The Sixth Circuit upheld this determination. Even the Steelworkers admit that the coke industry and the steel industry are, in fact, different industries.[4]

The two cases cited by Petitioner, concerning single bargaining units for workers in a highly integrated industry, are factually distinct from the present case. *Continental Webb Press, Inc. v. N.L.R.B.*, 742 F.2d 1087 (7th Cir. 1984), involved pressmen

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[4] Steelworkers Petition for Certiorari, Questions Presented, Question 2, last line, p. i.

and preparatory employees that performed many of the same duties and had a high degree of interaction. The workers in *N.L.R.B. v. Harry T. Campbell Sons' Corp.*, 407 F.2d 969 (4th Cir. 1969), had a higher degree of interaction than in the current case, performed some of the same tasks and worked in buildings and quarries that were located next to one another on the company's compound.

The case at hand differs from both of those mentioned above because there is geographical distance between the two plants, different skills are involved and the coke workers face different hazards than the steel mill workers do. In short, the Board found based upon the facts of the case at bar that the coke facility workers had a different community of interests than that workers at the steel mill.

The Sixth Circuit upheld the Board's ruling because it was not arbitrary and capricious and there was no abuse of discretion since the decision was based on substantial evidence in the record. The present situation is simply much different than the facts presented in either *Harry T. Campbell* or *Continental Webb Press.* The Board saw this and made a decision that was justified and well within its discretion. *See, also, South Prairie Construction Co. v. Local 627, International Union of Operating Engineers,* 425 U.S. 800 (1976) (the Court made it clear that the Board's decision concerning the selecton of an appropriate bargaining unit lies within the Board's discretion and should be given deference). Since the facts of the case at bar differ from those of the cases cited by Petitioners, no actual conflict among the circuit courts exists. Each circuit has applied the same principles of law, only to differing sets of facts. Thus, granting the Writ requested would be inappropriate.

Although functional integration of an operation is one factor to be considered in determining the appropriate bargaining unit, it is not the sole factor. Among other factors to consider are geographical proximity, degree of interchange among employees of different departments, similarity of working

conditions, skills and functions, and collective bargaining history.[5]

The court in *N.L.R.B. v. Indianapolis Mack Sales and Service, Inc.*, 802 F.2d 280 (7th Cir. 1986), cited by Petitioners, themselves, held that the Board erred when it considered only one of the factors - past bargaining history - in making a determination about an appropriate bargaining unit. Similarly, integration of the manufacturing process is only one of the factors to be considered. The ALJ and the Board, however, examined the integration of operations as well as the degree of interchange among employees, geographical proximity between the two plants, similarity of working conditions, differing skills and functions required of the workers in the two facilities, centralized administrative control and past bargaining history and determined that the coke plant workers were an appropriate bargaining unit and had not been accreted into Armco's existing facility. Petitioners' Supplemental Appendix (P.S.A.) pp. 120-122. The Sixth Circuit in upholding the Board's decision stated that there had been no abuse of discretion by the N.L.R.B. and that its decision was based on substantial evidence on the record. Absent an arbitrary and capricious decision where there is no substantial evidence on the record, the Board's decision should be granted deference based on its broad experience in these matters. *See, e.g. Beth Israel Hospital v. N.L.R.B.*, 688 F.2d 697 (10th Cir. 1982), *cert. denied*, 459 U.S. 1025 (1982).

Although the Board may have found accretion in some of the other steel mill cases that it has heard, it has broad discretion in defining bargaining units and this Court has recognized the need for flexibility in individual cases. *N.L.R.B. v. Hearst Publications*, 322 U.S. 111 (1944). This Court has opined that

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[5] *See, N.L.R.B. v. Foodland, Inc.*, 744 F.2d 735 (10th Cir. 1984), *E. I. DuPont de Nemours & Co.*, 162 N.L.R.B. 413 (1966), *Atlantic Richfield Co.*,231 N.L.R.B. 31 (1977); *Matlack, Inc.* 278 N.L.R.B. No. 36 (1986).

". . . the selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision 'if not final, is rarely to be disturbed.' " *South Prairie Construction Company v. Local 627, International Union of Operating Engineers,* 425 U.S. 800, 805 (1976), citing, *Packard Motor Company v. N.L.R.B.,* 330 U.S. 485 (1947).

The Sixth Circuit found no abuse of discretion by the Board and the decision was based on substantial evidence in the record. Absent findings that the decision was arbitary and capricious, the decision below should stand and this case should not be reviewed.

II. THE BOARD AND THE COURT OF APPEALS CONSIDERED A NUMBER OF FACTORS IN MAKING THEIR DETERMINATION THAT THE COKE PLANT WORKERS COMPRISE AN APPROPRIATE BARGAINING UNIT. THIS DECISION IS NOT IN CONFLICT WITH THAT OF THE SEVENTH CIRCUIT.

Although the court of appeals does say that past bargaining history alone is suggestive of a separate bargaining unit, it discusses other factors comprising community of interest and gives weight to them. The court considered the similarly of skills, lack of employee interaction and integration of the manufacturing process in its discussion. the Petitioners suggest that the court did not give adequate consideration to the integration of the process. However, the court did consider the issue and agree with the Board that the process was not highly integrated. *Armco, Inc. v. N.L.R.B., supra,* pp. 363-364.

The process of producing coke was separate from that of producing steel and some of the coke was indeed stockpiled for future use. P.S.A., pp. 119-120. The continuous process does not begin at the coke facility but rather at the blast furnace. *Id.,* p. 120. The Administrative Law Judge found that the coke facility was nothing more than a supplier to the steel mill.

Id. Based on factors that it has used many times in the past, the Board made a decision about the appropriate bargaining unit that was consistent with rulings it had made previously. The Sixth Circuit applied the appropriate standard of judicial review and upheld the Board's decision. There is no need for further review. Since the case at bar differs from the cases cited by Petitioners, no actual conflict among the circuit courts exists. Each Circuit has applied the same principles of law, only to differing sets of factors. Thus, granting the Writ requested would be inappropriate.

In *N.L.R.B. v. Indianapolis Mack Sales, supra,* the court held that the Board should not consider past bargaining history alone; rather, the Board should consider a wide range of factors that comprise the community of interests. The ALJ, the Board and the Court of Appeals in this matter considered these factors in rendering their decisions. This is consistent with the holding in *Indianapolis Mack Sales, supra,* p. 363. Thus, there is no conflict between circuit courts which this Court must clear up.

III. ECONOMIC FACTORS, WHILE DUE SOME CONSIDERATION, ARE NOT THE SOLE DETERMINANT OF THE APPROPRIATE BARGAINING UNIT.

The court below recognized that there were some changed economic circumstances after Armco purchased the coke facility in that, primarily, production had increased and Armco now had a greater number of employees. *Armco, Inc. v. N.L.R.B., supra.* The coke plant and the steel mill may have a united economic mission because they are both part of the same company and, generally, if the corporation flourishes, its distinct parts will also benefit. Interest in seeing the corporation show a profit, however, does not equate to workers having the same community of interests in their individual segments of the corporation. Workers in different parts of the corporation have different skills and face different working conditions.

In examining the components of "community of interests", the Board found that the coke facility workers face environmental hazards differing from those faced by steel mill workers and that the skills needed for job performance were different for the respective groups. P.S.A., pp. 117-121. The Board held that separate bargaining units were necessary to address these concerns. The Board's decision recognizes that workers in different departments of the same corporation can and do have different skills and face different obstacles in their effort to assist in keeping a company economically viable. The Sixth Circuit upheld this ruling finding that the decision was based on substantial evidence on the record and that there was no abuse of discretion. Since there was no abuse of discretion, the Board's decision should not be changed. *South Prairie Construction Co. v. Local 627, International Union of Operating Engineers, supra.*

In *N.L.R.B. v. Burns International Security Services,* 406 U.S. 272 (1972), this Court found that, holding the union or the new employer to the substantive terms of an old collective bargaining agreement may be inequitable, and that, unless certain changes were made in the old agreement, investment in moribund industries may be discouraged. The Court goes on to say:

> Saddling such an employer with the terms and conditions of employment contained in the old collective bargaining contract may make these changes impossible and may discourage the inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it should be unwilling to make to a large or economically successful firm. The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities. Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties.

Id., at 288. This passage indicates that both parties to a collective bargaining agreement will be affected by economic realities and marketplace fluctuations when they enter into an employee-employer relationship and that their subsequent negotiations will be affected by these conditions.

This Court's decision in *Howard Johnson Co. v. Detroit Local Joint Executive Board,* 417 U.S. 249 (1974), stands for the proposition that a successorship clause in a collective bargaining agreement cannot bind the successor where it is clear that the buyer refused to assume any obligations under the agreement. Armco has assumed all responsibilities under the old collective bargaining agreement except for the duty to bargain with OCAW. This notwithstanding, the Board found that Armco was a successor to Allied. Armco knew about its responsibilities in regard to the new plant and the new workers that were joining the corporation.

While Armco knew of its new responsibilities, it could not know with certainty what economic effect these new conditions would have on its operation. Armco knew there was a union involved and that there would be give and take in negotiations and that nothing was guaranteed. Likewise, the domestic steel market for the past few years has been sluggish at best. Armco knew that the economic "deal" it was getting by purchasing the coke facility was somewhat speculative given current market conditions.

Given the different concerns and community of interests that the workers in the coke plant had, including the long history of OCAW representation, and that coke production and steel manufacturing are, as even Armco admits,[6] different industries, the Company should have foreseen that possibly the future would not proceed according to its optimal economic plan. Armco's speculative financial strategy did not turn out as

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[6] Armco Petition for Writ of Certiorari, p. 15.

favorable as projected. Changing economic and market conditions are part of the risks that all businesses take; they are not, however, sufficient reason to overturn a legitimate decision made by the Board. This Court should not grant the Writ since there has been no abuse of discretion.

IV. THE ISSUE PRESENTED TO THIS COURT BY PETITIONERS IS NOT PROPERLY BEFORE THE COURT BECAUSE IT IS OF ROUTINE CHARACTER AND HAS BEEN PROPERLY RULED ON BY THE N.L.R.B. AND THE COURT OF APPEALS ACCORDING TO WELL-ESTABLISHED PROCEDURES.

The N.L.R.B. has issued an untold number of decisions concerning the appropriateness of a bargaining unit, using established guidelines to determine whether a similar community of interests for a group of workers exists. The ALJ and the Board used the same criteria in this case and determined that the coke plan workers comprised an appropriate bargaining unit, one that is separate from the steel mill workers.

The courts have dealt with the question of arbitary and capricious decisions and abuse of discretion by administrative agencies on many, many occasions. This Court has ruled that an agency decision is arbitrary and capricious if the agency has relied on factors which congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *See, Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Company,* 463 U.S. 29 (1983). The Court of Appeals for the Sixth Circuit decided that, given the evidence of this case, the Board's decision was not arbitrary and

capricious and was based on substantial evidence on the record. There was no abuse of discretion.

The N.L.R.B. used the same guidelines in this case as it has used for all of the bargaining unit determination cases it has heard in the past. The Sixth Circuit did likewise when it reviewed the Board's decision. This is not a case where new law is to be made or where either the Board or the Court of Appeals has acted contrary to any previous decision issued by this Court. Nor does this Court have to clear up any confusion or conflict about what the current state of the law is. There is no reason why this Honorable Court should review this case. The Board's ruling and the Court of Appeals decision upholding this ruling should stand.

CONCLUSION

This case involves a routine administrative decision and review of that decision. The N.L.R.B. acted well within its jurisdiction and discretion when it determined that the coke plant workers had a distinct community of interests and were entitled to be a separate bargaining unit. The Court of Appeals for the Sixth Circuit found that the ALJ and Board considered a wide range of factors in making the determination and all decisions were based on substantial evidence on the record. As mentioned above, the Sixth Circuit's decision is consistent with that of the Seventh Circuit in *N.L.R.B. v. Indianapolis Mack Sales and Services, supra.* There is no conflict among the Circuit Courts, nor did either the Board or the Court of Appeals act contrary to any previous decisions issued by this Court. There is no new law to be made in this case. The Petition for Writ of Certiorari should be denied.

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Nos. 87-1514 and 87-1719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARMCO INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

UNITED STEELWORKERS OF AMERICA, AFL-CIO and its Local 1865,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY OF PETITIONER ARMCO INC. TO BRIEFS IN OPPOSITION

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REPLY OF PETITIONER ARMCO INC. TO BRIEFS IN OPPOSITION

The Board's and OCAW's attempt to paint this case as one involving myriad small disputed judgments about myriad small disputed facts is a smokescreen that fails to conceal fundamental issues fully appropriate for decision by this Court. These issues are neither fact-bound nor unique to this case. They concern the proper influence in bargaining unit determinations of dramatic shifts in economic conditions, of undue leverage for a few hundred employees at the front end of a continuous production process employing thousands of employees, of defunct prior bargaining unit history in failed enterprises, and of decades of legal precedent and consistent industrial practice. In this particular case, the issues concern whether the Board's unit determination can be considered anything but unthinking and arbitrary when it draws no distinction between an independent coke plant, which is failing because it can sell only a small portion of the coke it can produce, and that coke plant, producing virtually at full capacity, as an element of a steel works. In the larger sphere, the issues concern whether in this age of industrial change the Board can properly shape the context of labor-management relationships on the basis of a wooden litany of unit determination criteria which fails to reflect or accommodate entirely new conditions brought about by the sale and acquisition of the particular unit.

In this case, the facts and circumstances which govern these issues are essentially undisputed. The post-acquisition operation of the Ashland Works is the same operation which exists in all other basic steel plants that include coke facilities and which has uni-

formly been recognized, in practice and by the Board, as a single bargaining unit. Thus, all the factors listed at Board Opp. 9 and 14 which are said by the Board to justify a separate unit are essentially the same factors which exist in all the many other basic steel plants that have coke operations, in every one of which coke is part of the larger unit. For example, as pointed out in the petition of United Steelworkers of America in No. 87-1719, at p. 9, n.7, dissimilar skills, duties and working conditions and limited employee interchange are characteristic of many departments of any basic steel plant but are much less persuasive of balkanization than functional integration is hostile to it. It follows that, at its core, the Board's position rests on giving controlling weight to a defunct past bargaining history in contravention of the strictures of §9(c)(5) of the statute and in conflict with the decision of the Seventh Circuit in *NLRB v. Indianapolis Mack Sales & Service, Inc.*, 802 F.2d 280 (1986).

The Board's answer to the "undue leverage" created by its unprecedented balkanization of the Ashland Works is extraordinary. The answer is to require Armco to revert to the open market in coke which Armco had gotten out of when it acquired the Allied plant.[1] Armco's whole purpose in acquiring the Allied plant and integrating it into the steel production process was to avoid open market purchases and stock-

[1] The Board says (Opp. 13): "In any event, the record in this case does not support the suggestion that the coke plant employees could shut down Armco's steel mill operations. Prior to the purchase of the [coke facility], Armco satisfied most of its coke needs through purchases on the open market. There is no reason to believe that it could not do so again."

piling because they are costly and inefficient and the quality of the coke so acquired is erratic and inadequate. The Board does not dispute that this was Armco's purpose, and it does not dispute that it was a legitimate and constructive purpose. Nevertheless the Board, in the interest of fractionalizing bargaining at the Ashland Works, would require Armco to abandon this purpose and revert to the wholly unsatisfactory vagaries of the open market.

This hugely impractical suggestion about the open market is of a piece with the Board's unrealistic statement (Opp. 10) that coke facilities which are part of integrated steel works are " 'nothing more than suppliers of a material used in steelmaking,' " like the Allied plant before the acquisition. The statement is an *ipse dixit* which fails to refute the undeniable fact that Armco has integrated the coke operation into the continuous steel production process, thereby creating the same single bargaining unit which exists in all the other integrated steel works that include coke.

The Board says *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966), upsets the unbroken precedent and practice which require a single unit, including coke, in basic steel operations (Opp. 11, n.4). The Board is wrong. *Mallinckrodt* is not a balkanizing decision that encourages smaller units. It is the opposite ofthat. *Mallinckrodt* overruled *American Potash & Chemical Corporation*, 107 NLRB 1418 (1954), which had unduly exalted the claims of crafts for severance (162 NLRB at 396), except in four "favored" industries, including steel. Thus *Mallinckrodt* swung the pendulum back toward *more favorable treatment of large unit claims*, including consideration of the interests of all the employees in the facility. 162 NLRB at 396.

In the course of this *anti*-balkanization opinion the Board said that all factors should also be examined even in the favored industries, which were not before it. 162 NLRB at 398 n.17. But it did not thereby break up, or even destabilize, the single unit in the favored industries. In fact, the Board justified its ruling that the extant single unit in *Mallinckrodt* was not to be balkanized by equating the functional integration in that case with the functional integration in steel and other favored industries. (162 NLRB at 398).[2]

Following its clear indication in *Mallinckrodt* that it had no intention of actually balkanizing steel, the Board, in the 20 years since *Mallinckrodt*, has *never once* balkanized steel or any of the other favored in-

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[2] The two cases cited by OCAW (Br. 6) to support its contention that this case does not depart from precedent are inapposite. The first, NLRB v. Metal Container Corporation, 660 F.2d 1309 (8th Cir. 1981), upheld a separate craft unit for highly skilled, "production-support" employees. The production employees on the functionally integrated production line remained in a single unit. It has long been recognized in Board law that the special interests of highly skilled craft employees may warrant a separate unit.

The second case, Hamilton Test Systems, N.Y., Inc. v. NLRB, 743 F.2d 136 (2d Cir. 1984), did not involve a Company with an integrated manufacturing operation. Rather, the Company was a service organization with employees scattered in four separate locations. Most of the work was performed on an as-needed basis at the work sites of the Company's customers and most of the employees were on the road and reported to their respective offices only once a week largely for administrative purposes. In short, there is no rational basis to apply the community of interest principles which governed Hamilton Test Systems to the highly integrated production employees at Armco's Ashland Works.

dustries, until it did so in this case. There is not one post-*Mallinckrodt* case in or out of steel that is consistent with the Board's two-unit decision for Armco's fully integrated Ashland Works. *Mallinckrodt* said nothing, and since *Mallinckrodt* the Board has done nothing until this case, to suggest that an appropriate separate coke department unit can exist in an integrated steelmaking facility. Thus, the essence of the Board's decision in this case is gratuitously to declare that factors which for decades have been understood not to balkanize steel may now be cited to balkanize it, all in the interest of allowing the defunct bargaining history to control.

The Board's opposition (at 14, 16) also relies on references to the perspective and expectations of employees in *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. ___, 96 L Ed 2d 22, 107 S Ct 2225 (June 1, 1987). But in *Fall River*, in contrast to this case, there was no question of change in the appropriate unit. Leverage was not an issue at all in *Fall River*, much less leverage by a small group of employees over a whole vast productive enterprise of which it had become a part, and over the thousands of employees in that enterprise. Contrary to the last statement in the Board's opposition, *Fall River* did not rule that employees' past bargaining unit status takes precedence over leverage, since leverage and the balkanization of an integrated unit were not issues there. The Board's attempt to apply the reference in *Fall River* to "legitimate expectations in continued representation by their union" (96 L Ed 2d at 38) to the different situation in this case is further proof that the decisions of the Board and the Court of Appeals come down to past bargaining history ov-

erriding the single unit which the integration of the coke facility into the continuous steelmaking process created.

The Board cursorily dismisses (Opp. 15) petitioners' position that the economic realities of this situation must be taken into account to assess correctly the community of interest which determines the appropriate unit question. The Board says that to give "decisive weight" to this factor would undermine §9(b)'s statement that "to assure to employees the fullest freedom in exercising" their statutory rights a less than plant-wide unit is among the permissible choices. But the Board gave the economic realities of the case no weight, much less decisive weight. And the Board's and the industry's long history of single-plant units, including integrated coke operations, in basic steel, shows that the determination has long since been made in the steel industry that the fullest freedom for exercise of employee rights is in a plant-wide unit. That determination was defied in this case and, in consequence, the basic constructive purpose of the coke plant purchase has been upset, undue leverage over steel works operations has been given to a relatively small group of employees, and long-term constructive precedent has been replaced with a new precedent which, if upheld, will discourage job-saving investment in basic steel and other domestic industry.

CONCLUSION

For the reasons stated in the petitions and this reply, the petitions for certiorari should be granted.

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